STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 247215 Wayne Circuit Court
WAYNE MANDEL JOHNSON, Defendant-Appellant.	LC No. 02-014118-01

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of attempted unlawful driving away of an automobile (UDAA), MCL 750.413. The trial court sentenced defendant as a third-offense habitual offender to a term of sixteen months' to 5 years' imprisonment. We affirm.

Plaintiff claims the police did not have probable cause to arrest him and thereby search the car he was riding in at the time of his arrest. We disagree. This Court reviews a circuit court's factual findings with regard to a ruling on a motion to suppress evidence for clear error. *People v Oliver*, 464 Mich 184, 191-192, 627 NW2d 297 (2001). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). To the extent that the court's ruling involves an interpretation of law, de novo review applies. *People v Gonzalez*, 256 Mich App 212, 232; 663 NW2d 499 (2003).

"'Probable cause exists when there is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person to believe that the accused is guilty of the offense charged.'" *People v Maynor*, 256 Mich App 238, 243; 662 NW2d 468, quoting *People v Carter*, 250 Mich App 510, 521; 655 NW2d 236 (2002). Here, there was substantial evidence to cause a person of reasonable caution to believe that defendant committed the crime. A witness observed two black men in dark coats walking toward a pickup and, a few seconds later, saw them sitting in or standing near the pickup with its window smashed. The witness saw the two men flee the pickup and get into a dark Cadillac. The witness called 911 and then trailed the Cadillac until a police car appeared and took over the pursuit. The police officer who stopped the Cadillac had received a police dispatch informing him to be on the lookout for a dark Cadillac driven by two men heading south on Oakman Road. All of these events occurred at 4:00 a.m. – hardly a time of day when numerous other cars of any description

are about – and the evidence showed that only those two vehicles were on the road. Moreover, the officer testified that he stopped the vehicle for speeding, that the occupants of the vehicle were two black men, and that the occupants were unable to explain where they had been or where they were going. Despite defendant's claim that this testimony was not credible, credibility is an issue for the factfinder, and this Court will not disturb the trial court's findings of credibility on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). The trial court did not err in denying defendant's motion to suppress.

Next, defendant claims the trial court erred by denying his motion for a directed verdict because there was insufficient evidence to find him guilty of attempted UDAA. We disagree.

This Court reviews a trial court's decision regarding a motion for a directed verdict de novo and considers the evidence "in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Specifically, defendant claims the prosecution did not present sufficient evidence to prove that defendant *attempted* to commit UDAA. The elements of an attempt are (1) specific intent and (2) an overt act toward commission of the crime. *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001); MCL 750.92. Here, defendant was seen (1) walking toward a pickup, (2) standing next to or sitting in the pickup after its window was smashed, and (3) fleeing the pickup. Defendant was followed by an eyewitness until police arrived and was arrested in possession of common tools used to steal cars. The prosecutor was not required to produce direct evidence – like fingerprints or a lineup identification – to establish the elements of the crime. Circumstantial evidence and the inferences drawn from it can be sufficient. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Viewing the evidence in the light most favorable to the prosecution, we conclude that a jury could have found, beyond a reasonable doubt, that defendant committed the offense of attempted UDAA. Therefore, the trial court did not err when it denied defendant's motion for a directed verdict.

Next, defendant claims trial testimony concerning the tools found in his possession was analogous to drug profile evidence and, thus, should not have been admitted. We disagree.

Because defendant failed to challenge the testimony below, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Drug profile evidence often consists of a list of characteristics that, in the opinion of police, are typical of individuals engaged in illegal activity. *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Such evidence is inherently prejudicial because of the potential that innocent people may be included in the profile. *Id.* at 240.

In the instant case, the owner of the damaged pickup testified that the window and steering column of his truck had been broken. Another witness testified with regard to how the tools found in the suspects' vehicle could be used to break into and steal another vehicle. This evidence was highly relevant to the charges in the case and thus was admissible under MRE 402 and 403. We decline, in the context of this unpreserved claim, to hold that the admission into evidence of possible break-in tools and their potential uses is analogous to the admission of

prohibited drug profile evidence, especially given defendant's failure to cite case law in support of this proposition. No plain, i.e., clear or obvious, error occurred. *Carines, supra* at 763.

Defendant also claims he was deprived of effective assistance of counsel when his attorney failed to object to the admission of this evidence. However, available case law did not deem the evidence inadmissible, and counsel is not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, defendant has not shown that the outcome of his trial would have been different but for the admission of the challenged evidence. Therefore, this claim must fail. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Next, defendant claims the trial court erred in failing to conduct an effective voir dire to ensure an impartial jury. However, an expression of satisfaction with the jury made at the close of voir dire waives objections to the manner in which the voir dire was conducted. *People v Arthur Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996). Similarly, failing to object and expressing satisfaction with the final jury also waives claims of error concerning the court's voir dire. *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988). Therefore, defendant's claim of error was waived.

Even if this issue had not been waived, defendant's mere claim that error "probabl[y]" occurred is not sufficient to warrant reversal. Rather, defendant must show that he was wrongfully convicted or that the fairness and integrity of the judicial proceedings were adversely affected. *Carines, supra* at 763. Because the material evidence against defendant was overwhelming, reversal is not warranted.

Next, defendant claims he was denied effective assistance of counsel by his attorney's failure to object to the jury. Again, however, defendant has not shown that the failure to object affected the outcome of the case; nor has he overcome the presumption that his attorney's decision not to object was sound trial strategy. *Knapp, supra* at 385-386.

Next, defendant claims the cumulative effect of all the errors denied him a fair trial. Only actual errors may be aggregated to make out a claim of cumulative error. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). We find no actual errors that cumulatively deprived defendant of a fair trial.

Finally, defendant requests a remand for correction of his sentence, claiming he is entitled to credit for time served while awaiting trial. However, defendant did not request credit for time served at sentencing. Therefore, this issue is not preserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any case, we note this Court's ruling that a parolee held on a parole detainer is not entitled to credit for time served with respect to the commission of a new offense. *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 137 (1994). Absent a showing that defendant has served the mandatory time for his prior sentence or that he was discharged from that sentence, credit for time served on the instant sentence would be inappropriate. See *People v Watts*, 186 Mich App 686, 690; 464 NW2d 715 (1991). Defendant has not made such a showing, and therefore no basis for a remand exists. If defendant can make the proper showing, he may enforce his rights in an appropriate proceeding below. See, generally, *id*. at 687 n 1.

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper